No. 00-1635

(3)

Supreme Court, U.S.
FILED
MAY 24 2001
OFFICE OF THE CLERK

In The
Supreme Court of the United States

W. B. YORK, *Petitioner*,

v.

DERONN WRATHER, STEPHEN WILLIAMS, and **VINCENT TURNER**, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHEAL C. SALEM
Counsel of Record
Salem Law Offices
111 North Peters, Suite 100
Norman, Oklahoma 73069
(405) 366-1234

THOMAS RICHARD O'CARROLL
O'Carroll & O'Carroll
2171 North Vancouver
Tulsa, Oklahoma 74127
(918) 584-4192

Attorneys for Respondents

May 25, 2001

27 pp

RESPONSE TO QUESTIONS PRESENTED

1. Under the rule of *Johnson v. Jones*, 515 U.S. 304 (1995), should this Court consider an interlocutory appeal of a question of the facts of an individual Defendant's supervisory participation in the deprivation of Respondents' Free Speech and Assembly rights, cast by Petitioner as a question of law?

2. Does silence on the record as to probable cause to disperse a crowd entitle a supervisory police officer to qualified immunity for allegedly exercising a "discretionary duty" when he ordered dispersal of a crowd which the district court found to be peaceably assembled, a determination not questioned by the Tenth Circuit, and his supervisory participation directly caused the violation of clearly established Free Speech and Peaceable Assembly rights?

3. Did either the district court or the Tenth Circuit retain the Petitioner in this 42 U.S.C. §1983 action based upon a theory of *respondeat superior* for his supervisory participation in an unconstitutional action affecting clearly established Free Speech and Assembly rights?

LIST OF PARTIES

The Petitioner did not include in the Petition a list of parties to the proceeding in the court whose judgment is sought to be reviewed (Supreme Court Rule 24(1)(b)).

Respondents include the following names of all parties to the proceeding in the court whose ruling is sought to be reviewed which do not appear in the caption of the case:

Bruce Bonham	)	
William Yelton	)	Appellants in the
Michael Eckert	)	Circuit Court
Steven Middleton	)	
City of Tulsa	)	
Susan Savage	)	
Ron Palmer	)	
Charles Jordan	)	Defendants in the
Chris Witt	)	District Court
Jim Clark	)	
W. B. Major	)	
A. Wilson	)	
Kevin Johnson	)	

TABLE OF CONTENTS

Page

RESPONSE TO QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

CASES v

FEDERAL AUTHORITY vii

STATE OR OTHER AUTHORITY vii

PRELIMINARY STATEMENT 1

OBJECTION TO PETITION 2

CONSTITUTIONAL, STATUTORY, AND RULES INVOLVED 2

COUNTERSTATEMENT OF THE CASE 4

REASONS FOR DENYING THE WRIT 8

I. PETITIONER YORK MISALLOCATES TO RESPONDENTS THE BURDEN OF SHOWING

WHAT HE WAS TOLD BY JORDAN AND CLARK AS A PART OF HIS CLAIM FOR QUALIFIED IMMUNITY. AFTER PLAINTIFFS SHOW A CONSTITUTIONAL VIOLATION AND CLEARLY ESTABLISHED LAW, IT WAS YORK'S BURDEN TO SHOW THE NECESSITY OF AND AUTHORITY TO REMOVE THE PLAINTIFFS AND OTHERS FROM THE SIDEWALK SUCH THAT HE WOULD BE ENTITLED TO QUALIFIED IMMUNITY 8

A. A CONSTITUTIONAL VIOLATION OF PEACEABLE ASSEMBLY OCCURRED 10

B. RIGHT TO PEACEABLY ASSEMBLE CLEARLY ESTABLISHED 12

C. PETITIONER HAS NOT SATISFIED HIS BURDEN 15

II. YORK'S LIABILITY IN THIS MATTER ARISES FROM HIS SUPERVISORY ACTIONS AND NOT *RESPONDEAT SUPERIOR*. HE KNEW OF OR SHOULD HAVE KNOWN THAT HIS DIRECTION TO HIS SUBORDINATES WOULD HAVE VIOLATED PLAINTIFFS' FIRST AMENDMENT RIGHTS. 16

CONCLUSION 18

TABLE OF AUTHORITIES

CASES **Page**

Andrews v. City of Philadelphia, 895 F.2d 1469 (3rd Cir., 1990) 17

Baptiste v. J.C. Penney Co., 147 F.3d 1252 (10th Cir., 1998) 15

City of Chicago v. Morales, 527 U.S. 41 (1999) 14

City of Houston, Tex. v. Hill, 482 U.S. 451 (1987) . . 14

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 2

Conn v. Gabbert, 526 U.S. 286 (1999) 8

County of Sacramento v. Lewis, 523 U.S. 833 (1998) . . 9

Cox v. Louisiana, 379 U.S. 536 (1965) 12

Edwards v. South Carolina, 372 U.S. 229 (1963) . . . 13

Gregory v. City of Chicago, 394 U.S. 111 (1969) . . . 13

Hill v. Hollingsworth, 110 F.3d 733 (10th Cir., 1995) 9

Hinton v. City of Elwood, 997 F.2d 774
(10th Cir., 1993) 9

Johnson v. Jones, 515 U.S. 304 (1995) 2

Kent v. Dulles, 357 U.S. 116 (1958) 13

Kite v. Kelley, 546 F.2d 334 (10th Cir., 1976) 17

Mitchell v. Forsyth, 472 U.S. 511 (1985) 2

Papachristou v. Jacksonville, 405 U.S. 156 (1972) . . . 13

Schenck v. Pro-Choice Network Of Western
519 U.S. 357 (1997) 14

Shuttleworth v. City of Birmingham,
394 U.S. 147 (1969) 12

Snell v. Tunnell, 920 F.2d 673 (10th Cir., 1990) 17

Whitney v. California, 274 U.S. 357 (1927) 13

Williams v. Fears, 179 U.S. 270 (1900) 13

Wilson v. Layne, 526 U.S. 603 (1999) 9

Woodward v. City of Worland, 977 F.2d 1392
(10th Cir., 1992) 16, 17

Wright v. Georgia, 373 U.S. 284 (1963) 13

FEDERAL AUTHORITY

28 U.S.C. §1254(1) 2

42 U.S.C. §1983 . . . . . 3, 16, 17

First Amendment to the Constitution
of the United States 2, 12, 14, 16

Fourteenth Amendment to the Constitution
of the United States 3, 13

STATE OR OTHER AUTHORITY

1 W. Blackstone, Commentaries on the Laws of
England 130 (1765) 14

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

W. B. YORK is the Petitioner and Defendant. DERONN WRATHER, STEPHEN WILLIAMS, and VINCENT TURNER are Respondents and Plaintiffs.[1]

The Tenth Circuit properly dismissed Petitioner's qualified immunity appeal and remanded for trial on the merits. Respondents object to the Petition for Writ of Certiorari.[2]

[1]Deronn Wrather has married Vincent Turner, but to make identification consistent with the record below, she will be referred as WRATHER.

[2]References to the Petition for Writ of Certiorari will be: (Cert. Pet., p. (number)). References to the Appendix of Petitioner will be: (Pet. App. (page number)). References to the original record on appeal will be: (R/A, Vol. (number) p. (page number)).

OBJECTION TO PETITION

Respondents respectfully contend that under the rule of *Johnson v. Jones*, 515 U.S. 304 (1995), this Court should not consider this interlocutory appeal: Petitioner has attempted to cast a question of fact as a question of law regarding an individual Defendant's supervisory participation in an unconstitutional action affecting the Free Speech and Assembly rights of the Respondents.

The jurisdiction of this Court was invoked pursuant to 28 U.S.C. §1254(1), and York apparently seeks to bring it within the "collateral order" rule of *Mitchell v. Forsyth*, 472 U.S. 511, 524-530 (1985) *See also Cohen v. Beneficial Industrial Loan* Corp., 337 U.S. 541 (1949).

CONSTITUTIONAL, STATUTORY, AND RULES INVOLVED

Amendment I. Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (Ratified effective December 15, 1791)

Amendment XIV. Constitution of the United States

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Ratified July 9, 1868)

United States Code, Title 42:
§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.(R.S.

§ 1979; Pub. L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284, as amended Pub.L. 104-317, Title III, §309(c), Oct. 19, 1996, 110 Stat. 3853.)

COUNTERSTATEMENT OF THE CASE

For purposes of this proceeding, Respondents rely upon the following recited facts and on two video tape excerpts used during discovery and submitted on summary judgment: Eckert #1, a video of the events exposed by an amateur, and Witt #1, a video of some of the events exposed by a professional television news photographer, both with audio tracks.[3]

On May 4, 1996, the Ku Klux Klan met on the steps of the Tulsa County courthouse for a rally to be followed by a cross burning on private land. To protect the constitutional rights of free speech and assembly of the Klan members, law enforcement preparations were elaborate. Numerous armed officers, squad cars, horse-mounted officers, and a helicopter were present.

After the rally ended and the Klan members had been escorted to their vehicles by Sheriff's deputies and had left, numerous persons, including many African-Americans and

[3] Copies of these videos have been lodged with Mr. Frank Lorson of the Court Clerk's office.

the Plaintiffs, assembled south of the county office building near where the Klan vehicles had departed.[4]

Tulsa police decided to remove the assembled crowd for several purposes. The officers claimed, *inter alia*, that they wanted to disperse the crowd in favor of Klan sympathizers going to their cars (Pet. App. 12a)(". . . Defendants have presented evidence that the officers wanted to disperse the crowd in order to allow Ku Klux Klan sympathizers to have access to their cars.")[5] and because the crowd was

---

[4] The Tenth Circuit indicated that the crowd had gathered approximately a block from the courthouse. (Pet. App. 2a) The video tape shows that the crowd was across the street from and directly south of the back of the courthouse.

Respondents disagree with Petitioner's statement that York was located ". . .at least a block away" from the scene. (Pet. Cert. 3). Officer Jordan testified that they were originally behind the YMCA at 6th and Denver and that York was at 6th and Cheyenne, approximately 50 yards north of 6th and Denver where the incident took place. (R/A, Vol. 1, p. 52)

The back of the courthouse appears in the Witt #1 video across the street from the crowd. The YMCA can be clearly seen in Witt #1 between 3:29 to 3:32 minutes into the video as the backdrop for the advancing horses. The letters "MCA" are visible. Thus, York was not necessarily as far away as his statement suggests, and his proximity would have affected his ability to view the scene prior to the horse operation.

[5]Petitioner's contention that "The group appeared to be waiting for the KKK to leave the courthouse area" (Cert. Pet. p. 2) may be ambiguous. The record does not show as an undisputed fact that the "waiting" group included the Plaintiffs and others whose assembling was

(continued...)

disrupting traffic flow (Pet. App. 13a). On the contrary, the Affidavit of Vincent Turner (Pet. App. 3a) and Witt #1 video show a peacefully assembled group.[6]

However, officers Jordan and Eckert consulted with Petitioner York, the overall commander of the operation, and decided to move the crowd out. Officers claimed they first told the crowd to disperse and that "when the crowd was instructed to move out of the street, many persons became

---

[5](...continued)
later broken up by the police. (R/A, Vol. I, p. 1-5)

Nor is the statement supported by Petitioner's citation to the Tenth Circuit's decision in the Appendix. (Pet. App. 2a)

Nor does the record support any suggestion that the officers were acting to protect the Klan members who conducted the rally. The skirmish between the crowd and officers occurred almost 20 minutes after the Klan rally participants left the premises. Clark's report includes a "Log of Significant Events" which has a time entry at 1542, "Lt. Jones stated that all Klan veh. Out of parking lot." A later entry claims there were Klan stragglers at 6th and Elwood. (R/A, Vol. I, p. 4)

[6] The Tenth Circuit made specific reference to video evidence submitted on summary judgment, apparently referring to Eckert #1:

> Video evidence was also submitted, showing that before the horses arrived approximately ten Tulsa police officers were on the street facing a crowd of men, women, and children, predominantly African-American, who were milling around on the sidewalk and grassy area, and were sitting on a concrete fence enclosing a parking lot. No angry threats or interchanges can be heard on the video tape, and the crowd's demeanor appeared peaceful.
>
> Pet. App. 3a

agitated." (Pet. Cert., p. 3) At the time the horses were injected, Witt #1 video shows none of the group out in the street and shows the crowd's demeanor to be peaceful.[7]

The crowd was scattered through use of mounted horses, officers in a skirmish line, and pepper spray. (Pet. App. 2a) Plaintiff Turner was arrested for disorderly conduct. Plaintiff Wrather was arrested for obstructing officers, resisting arrest, and assaulting an officer. Plaintiff Williams was arrested for inciting a riot, assaulting an officer, and

---

[7] By the testimony of the Mayor and the Chief of Police, the crowd appeared to be peaceful at the time the horses approached the crowd. At the very least, the dispute of these facts precludes summary judgment.

Mayor Susan Savage testified:

13 Q I apologize. Based upon your observations on
14 the tape, would you characterize the crowd, as you've
15 seen them on the tape, are they peaceful?
16 A Oh. Yes.
17 Q Peaceful?
18 A Yes.

R/A Vol.I, p. 35.

Chief Ronald Palmer testified:

Q. Sir, is it not true that at the time the officers arrived to established a skirmish line, and horses are interjected into the crowd, that the crowd is relatively peaceful?

140

A. The crowd appeared to be peaceful, but there was reports in my officers reports that there were problems in that crowd.

R/A, Vol.I, p. 120.

resisting arrest. (Pet. App. 2a) Plaintiffs contend they were peacefully assembled and arrested without probable cause.

REASONS FOR DENYING THE WRIT

I. PETITIONER YORK MISALLOCATES TO RESPONDENTS THE BURDEN OF SHOWING WHAT HE WAS TOLD BY JORDAN AND CLARK AS A PART OF HIS CLAIM FOR QUALIFIED IMMUNITY. AFTER PLAINTIFFS SHOW A CONSTITUTIONAL VIOLATION AND CLEARLY ESTABLISHED LAW, IT WAS YORK'S BURDEN TO SHOW THE NECESSITY OF AND AUTHORITY TO REMOVE THE PLAINTIFFS AND OTHERS FROM THE SIDEWALK SUCH THAT HE WOULD BE ENTITLED TO QUALIFIED IMMUNITY.

This Court has carefully crafted an immunity for public officials exercising discretionary functions which relies upon objective criteria:

> A court evaluating a claim of qualified immunity "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Conn v. Gabbert*, 526 U.S. 286 (1999). . . Deciding the

> constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public. See *County of Sacramento v. Lewis*, 523 U.S. 833, 840-842, n. 5 (1998).
>
> *Wilson v. Layne*, 526 U.S. 603, 609 (1999)

Accordingly, in its order, the Tenth Circuit properly held that:

> If a plaintiff makes the two-fold showing, the public official then bears the usual summary judgment movant's burden of showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. *Hinton [v. City of Elwood]*, 997 F.2d [774], [at] 779 [(10th Cir., 1993)]. Specifically, the defendant must show that " 'no material issues of fact remain as to whether the defendant's actions were objectively reasonable in light of the law and information the defendant possessed at the time of his action.' " *[Hill v.] Hollingsworth*, 110 F.3d [733] at 737 [(10th Cir., 1995)]
>
> Pet. App. p. 9a

York, however, contends that this latter burden remains with Respondents even after their requisite two-fold showing

rather than becoming his burden as would be normally expected in summary judgment determinations.

Plaintiffs showed that York was directly involved in the decision to remove them and other peaceably assembled persons from the sidewalks outside the Tulsa County office building so that Klan sympathizers could have the exclusive use of that sidewalk to travel to their cars. The right to peaceably assemble is clearly established. To be entitled to summary judgment on grounds of qualified immunity, it is York's burden to show undisputed facts that justified his decision; it is not Plaintiffs' burden to exclude all possibilities of York's nonliability. York's claim for immunity based upon an "absence of proof" which it was his responsibility to produce is the same as saying he had no reason for the decision.

Indeed, it is reasonable to require York to satisfy the ordinary burden of a party seeking summary judgment in its favor to produce sufficient evidence that excuses his liability once he is implicated in a constitutional violation.

A. A CONSTITUTIONAL VIOLATION OF PEACEABLE ASSEMBLY OCCURRED

For purposes of qualified immunity, the primary fact found by the district court and not challenged by the Tenth Circuit was that the crowd was peaceful.

Testimony, affidavits, and a video show that Plaintiffs' peaceful assembly was disrupted by Tulsa police officers obeying the commands of Defendant York. By his own admission, York participated in the order to disperse the

crowd, thereby demonstrating the personal involvement necessary to impose both direct and supervisory liability. From Defendant Jordan's perspective, York's action and participation were more than transitory: York was responsible for the horse procedure.

Q. Did anyone ever call you to answer to your decision to interject horses in this group that day, sir?
A. No, because Major York was there.
Q. Did anybody even ask you to write up a report about why you made this decision?
A. Major York made a report about it.

- - - - -

Q. But you're the man who made the decision, according to your testimony, sir.
A. No, that's not correct.
Q. You and Officer Clark.
A. Yes, that is correct.
Q. Okay. So, did Officer Clark write a report on why he made this decision; to your knowledge?
A. You'd have to ask Sergeant Clark.
Q. Why didn't you write a report, sir?
A. Because everything -- **before that decision was carried out, it was ran by Major York and he took responsibility for that decision.**
Q. Where was Major York?
A. At that point in time, he was at 6th and Cheyenne approximately fifty yards north of 6th Street.

- - - - -

> Q. Isn't it proper police procedure that you write a report when you make policy decisions like this, sir?
> A. I didn't make the decision. I gave him -- **It was made ultimately by Major York.**
>
> R/A, Vol. I pp.51-4 (Testimony of Charles Jordan)(emphasis added)

Plaintiff has satisfied his burden to show with particularity facts and law establishing the inference that Defendant York participated in a violation of a constitutional right through his decision to remove Plaintiffs who were part of a peaceful group. The Circuit's decision affirming denial of qualified immunity should not be disturbed.

B. RIGHT TO PEACEABLY ASSEMBLE CLEARLY ESTABLISHED

The law of the right to peaceably assemble is clearly established. Contention that the decision to disperse was based upon threats of violence is insufficient to justify curtailment of *First Amendment* rights. *See Shuttleworth v. City of Birmingham*, 394 U.S. 147, 152 (1969)("Peaceful citizens cannot be arbitrarily forced from a public sidewalk at the whim of a public official because of their race."); *Cox v. Louisiana*, 379 U.S. 536 (1965)(Local officials "unfettered discretion" in the regulation and use of the public streets was an unconstitutional infringement of the Petitioner's freedom of speech and assembly secured by the *First Amendment*);

Wright v. Georgia, 373 U.S. 284, 286 (1963); *See also Whitney v. California*, 274 U.S. 357, 378 (1927)("The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech and assembly.")(Brandeis, concurring); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Gregory v. City of Chicago*, 394 U.S. 111 (1969).

York took no action to protect the rights of the Plaintiffs to gather in locations of their choice, but instead decided to remove the Plaintiffs to give preference to a group of Klan sympathizers:

> . . . the freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the *Fourteenth Amendment*. We have expressly identified this "right to remove from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution. *Williams v. Fears*, 179 U.S. 270, 274 (1900); see also *Papachristou v. Jacksonville*, 405 U.S. 156, 164 (1972). Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage" *Kent v. Dulles*, 357 U.S. 116, 126, (1958), or the right to move "to whatsoever place one's own inclination may direct" identified in *Blackstone's*

Commentaries. 1 W. Blackstone, Commentaries on the Laws of England 130 (1765).

City of Chicago v. Morales, 527 U.S. 41, 53-54 (1999)

Police had no lawful authority to scatter a peaceably assembled crowd in order to protect Klan sympathizers from hearing its shouts and comments or to prefer their use of the sidewalk over the assembled group. *See Schenck v. Pro-Choice Network Of Western New York*, 519 U.S. 357 (1997)(Fixed buffer corridors can be established to permit expression by anti-abortion counselors)

Even verbal criticism directed at the police officers themselves would have been insufficient justification to disperse the crowd:

> . . . the *First Amendment* protects a significant amount of verbal criticism and challenge directed at police officers. "Speech is often provocative and challenging. . . . [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."

City of Houston, Tex. v. Hill, 482 U.S. 451, 461-62 (1987)

C. PETITIONER HAS NOT SATISFIED HIS BURDEN

Because Plaintiffs made the required two-fold showing that a constitutional right was violated and the law was clearly established, the public official then bears the usual summary judgment movant's burden of showing there are no genuine issues of material fact and that the official is entitled to judgment as a matter of law and that the official's actions were objectively reasonable in light of the law and information the official possessed at the time of the actions. York has the burden of showing the conversation between him and Defendant Jordan which justified the decision to remove the Plaintiffs.

Simply put, Defendant York has not proffered any evidence that his actions were objectively reasonable. He has offered no facts which justify the decision to remove Plaintiffs lawfully and peaceably assembled on the sidewalk. The burden to explain what information was given to him that objectively justifies the decision is his, not Plaintiffs'.

If there be some claim of "probable cause" sufficient to justify York's command to move out the Plaintiffs, he has not recited any. An officer has a ". . .nondelegable duty of determining probable cause." *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1258 (10th Cir., 1998) York had a nondelegable duty to determine a proper reason to give the command to disperse the peaceful crowd. He may rely upon what other officers have told him, but he has not testified as to what that was. Even if York claims that the crowd was violent, that is disputed by the video tape and the Affidavit of Vincent Turner: therefore, facts are in contention, and he

is not entitled to summary judgment. York's claim that this is the burden of Plaintiff is simply sleight of hand over the allocation of burden shifting for summary judgment determinations in qualified immunity cases.

II. YORK'S LIABILITY IN THIS MATTER ARISES FROM HIS SUPERVISORY ACTIONS AND NOT *RESPONDEAT SUPERIOR*. HE KNEW OR SHOULD HAVE KNOWN THAT HIS DIRECTION TO HIS SUBORDINATES WOULD HAVE VIOLATED PLAINTIFFS' FIRST AMENDMENT RIGHTS.

York raises a claim that the Tenth Circuit's decision will allow the imposition of liability based upon *respondeat superior*. However, such an issue is not discussed in the Circuit's decision nor does it reasonably appear that the Circuit's burden-shifting requirement properly allocated to York imposes *vicarious* liability on him for the actions of his subordinates.[8] Instead, the Circuit properly imposed on York the burden of showing his actions were reasonable in light of the facts in contention.

York commanded, directed, ratified, and acquiesced in the actions of Clark and Jordan and the other officers. *See Woodward v. City of Worland*, 977 F.2d 1392, 1400 (10th Cir., 1992)(". . proper articulation of the test for supervisory liability under **§1983** . . requires 'allegations of personal

---

[8]A discussion of *respondeat superior* does occur in the district court's decision, but not in reference to Defendant York. (Pet. App. 25a-26a)

direction or of actual knowledge and acquiescence.' ")[9] citing *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3rd Cir., 1990); *See also Kite v. Kelley*, 546 F.2d 334, 337 (10th Cir., 1976)(holding in a Bivens action that "before a supervisor may be held for acts of an inferior, the superior . . . must have participated or acquiesced in the constitutional deprivations") As otherwise stated by the Tenth Circuit:

> For liability under **§1983**, direct participation is not necessary. Any official who "causes" a citizen to be deprived of her constitutional rights can also be held liable. The requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights.
>
> *Snell v. Tunnell*, 920 F.2d 673, 700 (10th Cir., 1990)

No reasonable officer alert to the right of the Plaintiffs to exercise constitutional rights of assembly or loitering would have ordered the removal of Plaintiffs from the sidewalk in preference to Klan sympathizers.

---

[9]Thus, at the very least, York's acquiescence in the decision to disperse the crowd satisfies the ". . . deliberate, intentional act by the supervisor to violate constitutional rights" test noted in *Woodward v. City of Worland*, 977 F.2d 1392, 1399 (10th Cir., 1992).

CONCLUSION

Petitioner York attempts to misallocate the normal burdens required in summary judgment and to shift to the Respondent Plaintiffs an element of proof which is his. York clearly ordered the removal of Plaintiffs from the public sidewalk. Such an action viewed in light of facts most favorable to Plaintiffs would amount to a constitutional violation.

Further, the law of peaceable assembly has been clearly established for a long time. The Plaintiffs made their two-fold burden showing, so the burden of producing evidence shifts to York to show his actions were objectively reasonable. He has not done so.

York's liability is not based upon *respondeat superior*, but on supervisory liability. His order set in motion the unconstitutional deprivation of peaceable assembly suffered by the Plaintiffs, and contentions that the condition of the crowd was such that required dispersal are disputed. The Petition should be dismissed.

Faithful to constitutional principles, the Tulsa police, of which Petitioner is a supervisor, scrupulously protected the free expression and assembly rights of bigots and racists to assemble a Klan rally on the front door step of the Tulsa County courthouse. The Tulsa police's sensitivity to the free speech rights of Klan sympathizers resulted in a plan, participated in by all the Defendants, including Defendant York, to drive officers mounted on horses into the assembly

and to use pepper spray on resisters which resulted in the arrest of these African-Americans. The protections afforded members of the Invisible Empire were not the same as those afforded to these Plaintiffs.

Respectfully submitted,

MICHEAL C. SALEM
Counsel of Record
Salem Law Offices
111 North Peters, Suite 100
Norman, Oklahoma 73069
(405) 366-1234

THOMAS RICHARD O'CARROLL
O'Carroll & O'Carroll
2171 North Vancouver
Tulsa, Oklahoma 74127
(918) 584-4192

Attorneys for Respondents Deronn Wrather, Stephen Williams, and *Vincent Turner*